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No. 457

In the Supreme Court of the United States

OCTOBER TERM, 1931

PATRICK J. HURLEY, SECRETARY OF WAR, ET AL.,
PETITIONERS

v.

R. FOSTER KINCAID, SR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the District Court rendered upon the overruling of the defendants' motion to dismiss the bill of complaint (R. 10–29) is reported in 35 F. (2d) 235. The opinion of the District Court upon the merits (R. 117–125) is reported in 37 F. (2d) 602. The opinion of the Circuit Court of Appeals, adopting the opinions of the District Court (R. 138), is reported in 49 F. (2d) 768.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 15, 1931. (R. 139.) On August 14, 1931, an order was signed by a Justice of this Court extending for sixty days the period within which to file a petition for certiorari. The petition was filed October 13, 1931, and certiorari was granted November 23, 1931. (R. 139.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether the Flood Control Act of May 15, 1928, requires the acquisition of flowage rights by the United States in the absence of a determination by the Secretary of War and the Chief of Engineers that such rights are needed in carrying out the flood-control project.

2. Whether the facts found by the District Court are sufficient to support its conclusion that under the flood-control plan additional destructive flood waters will be diverted from the main channel of the Mississippi River upon the respondent's land, within the meaning of Section 4 of said Act.

3. Whether said Act requires the condemnation or purchase of flowage rights over the respondent's land before the United States may begin the construction in the Boeuf Basin of levees and other works authorized by the statute.

4. Whether the respondent is entitled to injunctive process in a court of equity to prevent the construction of levees and other works in the Boeuf Basin until the United States has acquired flowage rights over his land.

5. Whether the United States is an indispensable party to the suit.

STATUTE INVOLVED

The Act of May 15, 1928, c. 569, 45 Stat. 534, known as the Flood Control Act, is set forth in Appendix A, pp. 72–82, *infra*.

STATEMENT

The respondent sued in the District Court to enjoin the United States, James W. Good, Secretary of War, Major General Edgar Jadwin, Chief of Engineers; the Mississippi River Commission; T. H. Jackson, Charles H. West, Robert L. Faris, Edward Flad, John H. Stipes, Jarvis Bain, and Ernest Graves, members of the Mississippi River Commission; and Major John C. H. Lee, District Engineer, defendants, from constructing certain levees and other works contemplated by the Flood Control Act of May 15, 1928, pp. 72–82, *infra*. (R. 1–8.)

The bill alleged that by virtue of the Act of May 15, 1928, the United States had adopted a project for the flood control of the Mississippi River; that this project "differed from the old flood control system of * * * levees only, by the creation of certain diversion channels" (R. 3); that the defendants, pretending to act by authority of the Act

of May 15, 1928, were preparing to construct, and had advertised and received bids for the construction of, a floodway or diversion channel, known as the Boeuf Floodway, the purpose of which was to divert water from the main channel of the Mississippi River and to carry it through the floodway to some other point; that under the plan proposed the main levee of the river will be raised above and below the area of connection with the Boeuf Floodway so as to constitute a "fuse-plug levee," so called, for the purpose of having water break over the same during extraordinary floods, and flood the diversion channel; that guide levees are to be constructed on each side of this floodway, extending from Cypress Creek to the Red River backwater area; that the construction of these guide levees will make a pocket for the flow of water diverted from the Mississippi River; and that this diverted water will destroy the value of all property situated within the flood area (R. 3, 4).

The bill further alleged that the respondent owns land within the floodway, improved with buildings and used for agricultural purposes, valued at $9,000; that such land is now protected from the waters of the Mississippi River "if the levees hold"; that if the proposed guide levees are constructed respondent's land will be subject to overflow in time of flood and thus rendered unfit for agricultural or other purposes; that this action of the defendants will amount to a taking of respondent's property without due process of law and with-

out just compensation; and that the acts of the defendants in setting apart the property in question as a floodway and advertising for and receiving bids for the construction of the guide levees have cast a cloud upon the respondent's title to his land and have impaired his use of the same. (R. 4–6.)

The bill also averred that although the Fifth Amendment to the Federal Constitution and Section 4 of the Flood Control Act require that the respondent be compensated for the taking of his property the defendants have made no efforts to purchase or obtain his property by condemnation or otherwise. The bill prayed that the defendants be perpetually restrained from awarding any contracts for or carrying out any work on the Boeuf floodway under the proposed plan. (R. 6–7.)

The defendants moved to dismiss the bill on the grounds, among others, (1) that the action was one against the United States which had not consented to be sued, (2) that the court was without jurisdiction, (3) that the bill disclosed no ground for equitable relief, and (4) that the bill disclosed no cause of action. (R. 9.) The District Court, construing the bill as charging that the defendants were proceeding in violation of both the Flood Control Act and the Constitution, held that the United States could not and need not be a party, and that it should be dismissed as a party. (R. 10–16.) The court overruled the motion to dismiss the suit

and held that the Flood Control Act required the United States to condemn or acquire flowage rights over the respondent's property before going ahead with the flood-control project in the Boeuf Basin. (R. 16–29.)

Thereupon the defendants answered the bill, putting in issue its material allegations. (R. 29–31.) After a trial, the District Court found that under the proposed plan when the Mississippi River reaches such a stage that the so-called fuse-plug levee will break, about one-third of the water passing that point will be turned in the Boeuf Basin (R. 118); that with a flood at the maximum contemplated by the flood-control plan, the water might reach a height of 16.4 feet on the respondent's land and remain there for a period of from thirty to sixty days (R. 119–120); that under "the maximum flood conditions," the plan proposes to divert from 900,000 to 1,250,000 second-feet of flood waters through the Boeuf Basin, whereas no more than 450,000 second-feet ever went through the Boeuf Basin before (R. 122); that under the plan the respondent's property will be burdened and other property benefited (R. 120); and that "additional flood waters" will be diverted thereon (R. 122). The court found that the plan constituted a taking of rights with respect to the respondent's property, and that although the physical occupancy of the land would not occur until the land had been overflowed in time of flood, "the process of subjecting it to that service and the taking possession in so far

as is either necessary or contemplated by the act will begin with the construction of the first levee or works which are intended to direct the water upon the land." (R. 125.)

The court thereupon enjoined all the defendants, except the United States,[1] "from proceeding with

[1] The decree ran against "James W. Good, Secretary of War, and his successor, Patrick J. Hurley, Major General Edgar Jadwin, and his successor, Major General Lytle Brown," and the other named defendants. (R. 130.) The record does not show a substitution of Secretary Hurley as a party in lieu of Secretary Good, nor a substitution of General Brown as a party in lieu of General Jadwin. It does appear that on February 24, 1930, an appeal bond signed by both Secretary Hurley and General Brown was filed. (R. 129; see pages 119–120 of the certified copy of the record filed in this Court.) We are advised by the War Department that Secretary Good died on November 18, 1929, and that General Jadwin was retired as Chief of Engineers, on account of age, on August 7, 1929.

Even assuming that the voluntary appearance in the suit of Secretary Hurley and General Brown, as indicated by the filing of the appeal bond, amounted to a substitution of such officers as parties in lieu of their predecessors in office, so as to meet the requirements of Section 11 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 941 (U. S. C., Title 28, Sec. 780), the present suit would seem to be abated so far as General Brown is concerned, since the appeal bond was filed more than six months after the retirement of General Jadwin. *United States ex rel. Claussen* v. *Curran*, 276 U. S. 590, 591; *LeCrone* v. *McAdoo*, 253 U. S. 217, 219. If the filing of the appeal bond did not affect such a substitution, then the suit would seem to be abated also as to Secretary Hurley.

The effect of the decree of the District Court is to compel the condemnation or purchase of flowage rights over respondent's land, and thus to coerce action on the part of Secretary Hurley and General Brown, since Section 4 of the statute, pp. 75–76, *infra*, authorizes the condemnation or

the construction authorized by or carrying out the plan adopted by * * * the Mississippi River flood-control act, in the Boeuf Basin floodway, * * * until the property of the said complainant has been acquired by the United States Government or the flowage rights over the same acquired either by purchase or condemnation for such purpose." (R. 130.)

Upon appeal to the Circuit Court of Appeals the judgment of the District Court was affirmed "For reasons stated in opinions rendered by the District Judge." (R. 138.) This Court granted certiorari. (R. 139.)

Unconfradicted evidence introduced at the trial established the following facts:

After the disastrous flood of 1927 government agencies were put to work to formulate comprehensive plans for flood control in the Mississippi Valley. Two plans were prepared, one under date of December 1, 1927, by the Chief of Engineers, known as the "Jadwin Plan" (House Doc. No.

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purchase of only those flowage rights" which, in the opinion of the Secretary of War and Chief of Engineers, are needed in carrying out this project."

But even if the suit has abated as to Secretary Hurley and General Brown the decree of the District Court would seem still to be effective for the accomplishment of the end sought by the respondent in view of Section 8 of the Flood Control Act which provides that (pp. 78–79, *infra*)—

"The project herein authorized shall be prosecuted by the Mississippi River Commission under the direction of the Secretary of War and supervision of the Chief of Engineers and subject to the provisions of this Act."

90, 70th Cong., 1st Sess.; Senate Report No. 619, 70th Cong., 1st Sess., pp. 13–45), and the other under date of November 28, 1927, by the Mississippi River Commission (Flood Control Committee Document No. 1, 70th Cong., 1st Sess.). (See R. 31–32.)

The main features and scope of the Jadwin Plan are indicated by the following statements therefrom (Senate Report No. 619, *supra*, pp. 13, 14, 17, 19):

> 2. The plan is a comprehensive one, providing for the maximum flood predicted as possible, and for future expansion to meet changing conditions. It includes a spillway above New Orleans, diversion floodways in the Atchafalaya and Tensas Basins, a river bank floodway from Cairo, Ill., to New Madrid, Mo., together with strengthening and a moderate raising of existing levees. It is designed to prevent any material increase in flood stages. Channel stabilization and navigation improvement are included. Exclusive of rights of way, incidental drainage works, and damages, if any, recommended to be borne by local authorities, the estimated cost of flood-control works is $185,400,000, and of channel stabilization and mapping, $111,000,000; a total of $296,400,000. The distribution of cost must be determined by law. The suggestion is made that a distribution by which the cost of flood-control works in general is borne 80 per cent by the Federal Government and 20

per cent by the valley States, * * * would accord with * * * the precedents established by Congress.

* * * * *

The recommended plan fundamentally differs from the present project in that it limits the amount of flood water carried in the main river to its safe capacity and sends the surplus water through lateral floodways. * * *

* * * * *

4. The * * * plan * * * can be advantageously executed in approximately 10 years.

* * * * *

24. The estimated cost of $296,400,000 for the construction of flood-control and navigation work does not include the costs of rights of way nor possible damage to structures which have invaded the natural flood bed of the river. It is expected that these, if any of them are legal and proper, will be borne by the States or other local interests who will in general be greatly benefited by the execution of the plan.

* * * * *

The plan of the Mississippi River Commission was fundamentally similar to the Jadwin Plan, although there were some engineering and economic differences. (See Senate Report No. 619, *supra*, p. 9.) With respect to the Boeuf and Atchafalaya Basins the chief difference was that the Mississippi River Commission's plan included a

fixed weir spillway at the head of the Boeuf Basin and contemplated the removal of a stretch of existing levee at the head of the Atchafalaya Basin, whereas the "Jadwin plan" provided for leaving the levees at the heads of these basins as they existed. (See Flood Control Committee Document No. 1, 70th Cong., 1st Sess., § 243–261.) The Jadwin Plan recommended local contribution towards the erection of the flood-control works, and recommended that local interests should furnish all rights of way and lands needed for levees or otherwise, and all flowage rights. The Mississippi River Commission plan recommended that the United States should pay for all costs of flood-control works, except that local interests should provide lands and rights of way for new levees and for relocation of levees. No definite recommendation with respect to flowage rights was expressed. (See paragraphs 331 to 336, Senate Report No. 619, *supra,* pp. 47–49.) Under the Jadwin Plan the estimated expense of the Boeuf floodway was fixed at $7,700,000, this being the cost of the protection levees. (Senate Report No. 619, *supra,* p. 42.) Under the Mississippi River Commission Plan the expense of the proposed Boeuf flood way was fixed at $107,000,000. (Senate Report No. 619, *supra,* p. 51.)

By Section 1 of the Flood Control Act of May 15, 1928, p. 72, *infra,* Congress adopted the Jadwin Plan and authorized its prosecution under the

direction of the Secretary of War and the Chief of Engineers. A board of engineers was created—

> to consider the engineering differences between the adopted project and the plan recommended by the Mississippi River Commission * * * and * * * to recommend to the President such action as it may deem necessary to be taken in respect of such engineering differences and the decision of the President upon all recommendations * * * shall be followed in carrying out the project herein adopted.

On August 8, 1928, the Flood Control Board submitted to the President its report, in which it found that the Jadwin Plan provided a sound engineering plan for protection against floods, and recommended the adoption of the engineering features contemplated by that plan. (Flood Control Committee Document No. 28, 70th Cong., 2d Sess.) On August 13, 1928, the President approved the engineering recommendations in the Board's report.[2] (R. 32.)

The principal features of the flood-control plan involved in the instant case are shown on the map at page 136 of the record. It is proposed to raise the levees along the main channel of the river about three feet wherever the double brown line is shown

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[2] See pp. 39–40, *infra*. The Attorney General has ruled that upon the approval of this report by the President "the project covered by the Act has now become fixed and definite with no power of modification or change, except as provided in the project itself, by any authority save the Congress." 36 Ops. A. G. 80.

on the map. (R. 75.) Thus, at the head of the Boeuf Basin it is proposed to raise about three feet the levees on the south bank of the Arkansas River, the levees on the west bank of the main channel of the Mississippi River south of Luna Landing, and the levees on the opposite side of the river. The so-called "Cypress Creek fuse-plug levee" is that portion of the levee on the west bank of the main channel between Rohwer and Luna Landing. It was built in 1920 and 1921 by local interests with permission of the Federal Government. (R. 38, 42, 52, 67, 110.) This levee, under the plan, is to remain at its present strength and height. (R. 110; see also paragraph 118 of the Jadwin Plan, Senate Rept. No. 619, *supra,* p. 38.) During extraordinary floods excess water will overflow this levee, just as is now the case, into the Boeuf Basin. In this connection the Jadwin Plan states (Senate Rept. No. 619, *supra,* p. 38):

> Water will not top the Cypress Creek fuse-plug levee and go down the floodway until it is so high that it must find an outlet. No flood except that of 1927 has reached such a stage. However, due to an increase in flood heights by reason of levee construction and drainage, it has been estimated that a stage over the present levee top at Cypress Creek might occur in the long run about once in 12 years.

The proposed guide or protection levees in the Boeuf Basin, west of the Mississippi River, which

are intended to limit the floodable area thereof, are clearly indicated on the map by heavy brown lines. The west protection levee begins, on the north, at Rohwer and extends southerly to Windsor, where it is interrupted by high land. Its continuation is the loop levee surrounding the city of Monroe. (R. 75.) The east protection levee begins, on the north, at Luna Landing and runs southerly to high ground just south of Chicot. This portion of the levee is designed to prevent any flow through the Macon or Tensas Basins of flood water which may escape from the main channel over the Cypress Creek levee. (R. 38, 39, 47.) The east levee starts again from the high ground just north of Terry and proceeds southerly to Wisner. (R. 75.)

The Boeuf Basin is a natural overflow area of the main channel (R. 76, 106, 109) and has been subject to overflow in the event of floods from time immemorial (R. 76; see Report of the Mississippi River Commission, § 138–156, Flood Control Committee Document No. 1, *supra*). The respondent's land is located in the lower part of the Boeuf Basin, twenty miles from the proposed east levee, forty-five miles south of Monroe, and about 125 miles from the fuse-plug levee. (R. 35, 36, 44, 113, 117–118.) The difference in elevation between the fuse-plug levee and the respondent's land is about eighty feet. (R. 92.) The land in question consists of 160 acres, improved with houses and barns, and was valued at approximately $9,000 prior to the enactment of the Flood Control Act. (R. 32, 35.)

The respondent's land was partially flooded in 1913, 1916, 1922, and 1929 (R. 33, 55, 113), and entirely flooded in 1882, 1912, and 1927. (R. 33, 52, 55, 71, 113.) In 1927 it was flooded for about six weeks to a height of from four to twelve feet. (R. 33, 35, 53, 55, 64, 67, 114.)

It was the opinion of engineers who testified for the respondent that if a flood as great as the 1927 flood should occur with the flood-control project in operation, the respondent's land would be flooded to a much greater extent than it was in 1927. (R. 36, 41, 46, 47, 49, 53, 54, 68.) One witness stated that under such circumstances twice as much water would go down the Boeuf Basin as in 1927. Another stated that with a flood equal to the 1927 flood the respondent's land under the plan proposed would be flooded at least 10 feet higher than in 1927. (R. 36, 53.) One engineer testified that the effect of the flood-control plan would increase the frequency of stages which would overtop the "fuse-plug levee," and the volume of water "flowing at all times that diversion takes place at Cypress Creek." (R. 48.) One witness stated that under the plan the respondent's land would be flooded about once every four years. (R. 41.)

Government engineers testified that lands between the protection or guide levees in the Boeuf Basin would continue to have under the proposed plan the same protection that they now have (R. 79, 102); that consummation of the plan would have no harmful effect upon respondent's land (R. 77,

78, 105); that the effect of the proposed guide levees would be to *restrain* the water from leaving the main channel of the river, and that such levees would not cause more water to flow from the main channel of the river upon respondent's land (R. 77–78, 102, 108, 114); that less water would leave the main channel of the Mississippi River than before (R. 78, 79, 102, 108, 112, 114); and that the carrying capacity of the main channel of the river would, under the plan, be tremendously improved, by revetment work and otherwise, so that when the plan is completed the main channel of the river will be able to carry much more water than is now the case (R. 81, 97, 99, 102, 106, 107, 114). These engineers testified that under the plan when completed the respondent's land would not be flooded more often than once in twelve or thirteen years. (R. 78, 103, 105, 107, 113.)

Evidence introduced by the respondent tended to show that the adoption by Congress of the Flood Control Act had made it difficult, if not impossible, to secure loans on farm lands situated similarly to the respondent's land (R. 55–56, 58, 59, 61, 65–66), although most of the witnesses testified that the same condition had existed since the 1927 flood and prior to the adoption of the flood-control plan (R. 57, 58, 59, 66). The respondent has not attempted to sell or secure a loan upon his land since the enactment of the statute. (R. 34.)

It was stipulated that the United States has advertised and received bids for the construction of

certain parts of the work to be performed in the Boeuf Basin in carrying out the flood-control project. (R. 31.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

1. In holding that this was not a suit against the United States.

2. In holding that the United States was not a necessary party.

3. In holding that the District Court had jurisdiction.

4. In holding that the bill of complaint presented a case for equitable relief.

5. In holding that respondent did not have an adequate remedy at law.

6. In holding that the Flood Control Act of May 15, 1928, requires the United States to acquire or to start condemnation proceedings for flowage rights over respondent's property before proceeding with the construction in the Boeuf Basin of the projects authorized by the Act.

7. In holding that the construction by the United States of flood-control works in the Boeuf Basin, as provided by the Act of May 15, 1928, would amount to a taking of respondent's property in violation of that Act and the Fifth Amendment to the Constitution of the United States.

8. In finding that under the proposed plan for flood control "additional destructive flood waters" will be "diverted" upon the respondent's land.

9. In affirming the decree enjoining petitioners.

SUMMARY OF ARGUMENT

Section 4 of the Flood Control Act provides that—

> SEC. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: * * *
>
> The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, * * *.

Since the second paragraph of Section 4 limits the Secretary's authority to the acquisition of flowage rights "which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project," the petitioners contend that the *only flowage rights which Section 4 requires the United States to "provide" are those which the Secretary and the Chief of Engineers have determined to be necessary.* In the instant case the Secretary and the Chief of Engineers have not determined that flowage rights over the respondent's land are needed.

Moreover, the first paragraph of Section 4 has no general application to the respondent's land. That section was intended by Congress to apply only to

situations where the flood-control plan contemplates the deliberate diversion, by eliminating or diminishing existing flood protection, of destructive flood waters over lands not previously subjected to like destructive flood waters. The Boeuf Basin, in which the respondent's land is located, has from time immemorial been a natural overflow area of the Mississippi River, and the respondent's land has been repeatedly flooded. Unlike other floodway projects contemplated by the plan, as to which existing levee protection is to be eliminated or reduced, the flood-control plan provides that the Boeuf Basin shall retain the same levee protection which it now has, and accordingly Section 4 is not applicable to lands within that Basin. This conclusion is confirmed by the legislative history of the statute.

But even if Section 4 be construed as applicable to the Boeuf Basin, and as requiring the acquisition of flowage rights over all lands which under the plan will receive more destructive flood waters than without the plan in operation, whether or not the Secretary of War and the Chief of Engineers determine that such rights are needed, neither the findings of the District Court nor the evidence establish that Section 4 is applicable to the respondent's land. The District Court found that under the plan, and with "maximum flood conditions" prevailing, more water would overflow the respondent's land than would be the case with the flood protection of the Boeuf Basin remaining in

its present status. The court did not find when, if ever, or how often, such flood conditions might occur. The court did not find that under the plan the respondent's land would be overflowed more frequently or for longer periods than is now the case, or that over any given period of time more water would pass over the respondent's land than without the plan in operation. Evidence introduced by the petitioners tended to establish that the respondent's land would continue to have under the plan the same flood protection which it now has, that under the plan such land would not be flooded more often than once in twelve or thirteen years, and that less water would enter the Boeuf Basin from the main channel of the Mississippi River than under present conditions. Accordingly, neither the findings of the trial court nor the evidence warrant the legal conclusion of the court that the plan will result in the "diversion" of "additional destructive flood waters" upon the respondent's land.

Assuming that Section 4 requires the acquisition of flowage rights over the respondent's land, the statute does not require that such rights must be condemned or purchased prior to the construction of the proposed levees in the Boeuf Basin. Section 4 authorizes the condemnation or purchase of flowage rights only when such rights," "in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project." Whether or not this language

creates a limitation upon the *right* of any landowner *to recover compensation,* as the petitioners contend, it is plain that it *limits the condemnation or purchase of flowage rights to those which the Secretary and the Chief of Engineers have determined to be necessary.* In the instant case the Secretary of War and the Chief of Engineers have decided that flowage rights over the respondent's land are not needed. In the absence of a showing of bad faith or arbitrary action on the part of these officers, a court can not substitute its opinion for theirs. If these officers have made an erroneous determination, and have determined that it is not necessary to acquire flowage rights which the statute directs the United States to provide, the remedy of the plaintiff is not a suit against the petitioners for an injunction, but an action against the United States for the value of such flowage rights.

The respondent does not attack the constitutionality of the Flood Control Act. If the petitioners were acting pursuant to a lawful statute they could not be enjoined even if their acts would result in a taking of the respondent's property, within the meaning of the Fifth Amendment. But nothing which the petitioners have done or propose to do constitutes a "taking" of the respondent's property within the meaning of the Fifth Amendment. No actual physical invasion or appropriation of respondent's land has occurred or is about to occur. Even when the plan is completed,

at least ten years hence, it is highly conjectural when a flood of sufficient severity will occur to cause the flooding of such land. Viewing the evidence in its most favorable light as to the respondent, the only presently existing damage established is that the sale and loan value of his land has been "affected materially." These facts do not establish a taking. This Court has repeatedly held, with respect to claims of damage arising from the construction of public improvements, that there must be "an actual invasion or appropriation of land as distinguished from consequential damage" before there is a taking of property within the meaning of the Fifth Amendment.

Moreover, assuming that the flood-control plan will result in damage to respondent's property for which he is entitled to compensation, the respondent has not established that he is entitled to equitable relief. The bill of complaint is not based upon actual or threatened impairment of the respondent's rights, but "upon assumed potential invasions." It is well established that where there has been no actual appropriation or physical invasion of one's property by reason of the construction of a public improvement, an injunction will not issue to interfere with the consummation of such project. If the respondent is entitled to compensation, he is entitled to sue the United States upon an implied contract in the Court of Claims, or in the District Court under the Tucker Act, for the damages which he has sustained or will sustain.

If, as we contend, the petitioners were not acting illegally, no cause of action against them as individuals existed, and the United States was an indispensable party to the suit. The bill of complaint should have been dismissed, since the United States has not given its consent to be sued.

ARGUMENT

I

THE FLOOD CONTROL ACT DOES NOT REQUIRE THE UNITED STATES TO PROVIDE FLOWAGE RIGHTS OVER THE RESPONDENT'S LAND

The District Court held that the Flood Control Act of May 15, 1928, required the United States to provide flowage rights over the respondent's land, and that these rights must be acquired before the Government could undertake construction of the projects contemplated by the statute. (R. 125.) The decree of the court enjoined the petitioners from taking any steps to carry out the project in the Boeuf Basin until such flowage rights, or the land itself, had been acquired by the United States, through condemnation or purchase. (R. 131–132.) The petitioners contend that the District Court's interpretation of the statute is erroneous.

A. The Flood Control Act requires the United States to "provide" only such flowage rights as are determined by the Secretary of War and the Chief of Engineers to be needed in carrying out the flood control project. These officers have not determined that flowage rights over the respondent's land are needed

The decision of the District Court that the Flood Control Act requires the United States "to pay for

the rights which it seeks to exercise" over the respondent's land (R. 121, 125) is predicated upon the first paragraph of Section 4 of the statute which provides that (pp. 75–76, *infra*):

> The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River.

The District Court concluded from the evidence that the flood control plan contemplated the "diversion" of "additional destructive flood waters" upon the respondent's land.

In emphasizing the first paragraph of Section 4 the District Court seems to have overlooked the second paragraph of that section, which provides:

> The Secretary of War *may* cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way *which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project,* the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right of way is located. * * * When the owner of any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights of way required for this project. The provisions of sections 5 and 6 of the River

and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights of way needed for works of flood control: * * * (Italics ours.)

Passing for the moment the questions (1) whether the first paragraph of Section 4 has any application to the respondent's land, and (2) if so, whether the evidence and findings of the trial court sustain its conclusion that under the plan "additional destructive flood waters" will be *diverted* upon his land, the petitioners contend that the second paragraph of Section 4 is a necessary limitation upon or qualification of the first paragraph, and that Section 4, when read in its entirety, requires the United States to "provide" *only such flowage rights as are determined to be necessary by the Secretary of War and the Chief of Engineers.* If this conclusion is sound, the decree of the District Court is plainly erroneous, since there is no showing that the Secretary of War and the Chief of Engineers have found that flowage rights over the respondent's land are needed.

The general provision of the first paragraph of Section 4 that the United States shall "provide" certain flowage rights, therein described, is immediately followed, and in the same section, by provisions for the acquisition of such flowage rights. Such acquisition is authorized *only* with regard to flowage rights "*which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project.*"

It seems clear that the provisions of the first and second paragraphs of Section 4 are coextensive. The direction of the first paragraph is that the United States shall "provide"—not "pay for" or "compensate for"—certain rights. The second paragraph designates the *only* methods by which such rights can be *provided*. The direction *to provide* is thus limited by the limitations placed upon the means afforded *for providing*. To hold otherwise would result in construing the direction to *provide* flowage rights as a direction to *pay for* flowage rights which, although taken or appropriated by the United States in some fashion, could not be either condemned, purchased, or donated, and thus never *provided*, within any reasonable meaning of that word. Accordingly, we submit that the only flowage rights which the United States must "provide" are those which in the opinion of the designated officers are needed in carrying out the project.

Practical considerations which influenced Congress in limiting the acquisition of flowage rights to those only which the Secretary and the Chief of Engineers deem necessary, are obvious. Army engineers estimate that the Boeuf and Atchafalaya floodways alone contain approximately 4,000,000 acres of land. (Cong. Rec., Vol. 69, p. 6655.) If Section 4 is applicable to these floodways there arises the question of fact as to each acre of land within these floodways whether it, or flowage rights over it, are needed in carrying out the flood control

project. The determination of this question, as forcibly shown by the evidence in the instant case, is a "peculiarly expert question." Some means for its determination had to be provided.

The precise consequences of the flood control plan in the event of a flood of major proportions are predictable with only a moderate degree of accuracy, even by the most expert of engineers. Congress was clearly not in a position to predict such consequences. It could, and did, enunciate the guiding principles which should determine the payment of compensation for damages incident to the flood control plan. But the application of such principles of compensation was, of necessity, left to executive officials. Knowing, on the one hand, that no determination of these officials, however honestly or mistakenly made, could operate to deprive any landowner of the constitutional guaranty against the taking of property without just compensation, and recognizing the impossibility, from a practical point of view, of leaving to the courts the determination of the difficult and highly complex questions of fact involved in so many possible cases, Congress made *express provision for acquiring* only flowage rights "which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project." The constitutional right of compensation, of course, would remain unimpaired if in the carrying out of the project property was taken

although it had not been acquired, but that right is not now asserted.

Giving to the first paragraph of Section 4 the comprehensive scope attributed to it by the District Court, it is not incumbent upon the United States to "provide" flowage rights over any tract of land within the immense areas of the floodway channels contemplated by the statute unless it is shown, *as a fact,* that "additional destructive flood waters" will, under the plan, be "diverted" upon such land. The statute in unmistakable terms vests the determination of this question in the officers named. The repeated decisions of this Court establish that in the absence of bad faith or arbitrary action the exercise by these officers of the power delegated to them is not subject to review by the courts. *Wisconsin* v. *Illinois,* 278 U. S. 367, 414; *Bragg* v. *Weaver,* 251 U. S. 57, 58; *Southern Pacific Co.* v. *Olympian Dredging Co.,* 260 U. S. 205, 208; *Field* v. *Clark,* 143 U. S. 649, 693; *Chappell* v. *United States,* 160 U. S. 499; *Union Bridge Co.* v. *United States,* 204 U. S. 364.

The conclusion reached above is supported by the legislative history of Section 4. The second paragraph of Section 4, as originally submitted to the Senate by the Committee on Commerce (Cong. Rec., Vol. 69, p. 5483), and as originally passed by the Senate (Cong. Rec., Vol. 69, p. 5491), provided:

> The Secretary of War may cause proceedings to be instituted for the acquirement by

> condemnation of any lands, easements, or rights of way needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right of way is located. * * *

Thereafter the House Committee on Flood Control recommended that that portion of Section 4 above quoted be amended by inserting after the words "rights of way," in the second line above, the words, "which, in the opinion of the Secretary of War, are." (House Report No. 1100, 70th Cong., 1st Sess., p. 1; Cong. Rec., Vol. 69, p. 6665.)

In commenting upon this amendment the Report of the Committee on Flood Control states (p. 6):

> The second paragraph of this section provides that the Secretary of War may cause condemnation proceedings to be instituted for the acquirement of any lands, easements, or rights of way needed in carrying out the project, *but does not specify who is to determine what land is necessary to be acquired.* The paragraph has therefore been amended to provide that the Secretary of War may cause condemnation proceedings to be instituted to acquire any land, easements, or rights of way *which in his opinion are needed to carry out the project.* (Italics ours.)

The committee amendment to Section 4 above set forth was agreed to by the House. (Cong. Rec., Vol. 69, pp. 7111, 7124–7125, 7133–7135.) Thereafter, in conference the House amendment was

amended still further to read as follows (House Report No. 1555, 70th Cong., 1st Sess., p. 2):

> which, in the opinion of the Secretary of War and the Chief of Engineers, are * * *

In commenting upon this further change, which represents the bill as finally enacted, the Conference Report states (p. 5):

> No. 16: Inserts the language proposed by the House, to the effect that *the opinion of the Secretary of War is to decide what lands, easements, or rights of way are necessary to be acquired,* and adds that the opinion of the Chief of Engineers is also to be followed. (Italics ours.)

The statute thus provides that the Secretary of War *may* purchase or condemn any lands, easements, or rights of way which, "in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project.". If the fact were not clear from the language itself, the committee reports above cited make it plain that the Secretary of War and the Chief of Engineers were given discretion to determine what lands or what flowage rights should be purchased or condemned. In the instant case the Secretary of War and the Chief of Engineers have not determined that flowage rights over the respondent's land are needed. (R. 29–31.) Accordingly, the District Court erred in issuing the injunction against the petitioners.

B. The first paragraph of Section 4 of the Flood Control Act has no application to the respondent's land

As pointed out above, the decision of the District Court is based upon the first sentence of paragraph 4 which provides that (pp. 75–76, *infra*):

> The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River..

Although the District Court stated that the Act did not make clear what was meant by the words "additional destructive flood waters" (R. 25, 122), it concluded from the evidence that the plan contemplated the "diversion" of such waters upon the respondent's land. The petitioners contend that the provision of Section 4 above quoted has no application to the respondent's land.

The language of Section 4 is carefully limited. The "flood waters" to which the section refers are those which: (1) pass from the *main channel of the river;* (2) are *diverted* from the main channel; (3) are *destructive;* and (4) are *additional.* If possible, all these limitations must be given effect. The statute does not contemplate the acquisition of flowage rights for flood waters unless they are *destructive* flood waters which have been *diverted from the main channel.* Nor does it contemplate flowage rights for diversions of destructive flood waters unless such destructive flood waters are *additional.* Additional to what? Giving the language used a reasonable interpretation, it must

refer to destructive flood waters additional to those the land in question would receive if the present flood protection devices were maintained in their present status. In other words, Section 4, by its terms, can apply only to a situation where the plan contemplates the deliberate diversion from the main channel of flood waters in such volume or velocity as to cause the destruction of property which could not occur without the plan in operation.

While the meaning of Section 4 may not be altogether apparent upon its face, we believe that the legislative intent appears plainly enough when that section is read in connection with other parts of the statute and in the light of the main features of the flood-control plan.

Section 3 of the statute provides, in part, that (pp. 74–75, *infra*)—

> No liability of any kind shall attach to or rest upon the United States for any damage from or by flood or flood waters at any place.

This is a sweeping exemption of liability, clearly broad enough to cover the instant case, which shows that, except for those cases falling specifically within the exceptions to Section 3 created by the proviso following the clause just quoted and by Section 4, Congress intended to preserve intact the well-settled freedom from liability of the United States in the construction of works for the control of the Mississippi River. (See pp. 62–63, *infra*.)

Unless Section 3 is to be discarded as meaningless, it is obvious that Section 4 was not intended to provide for the acquisition of flowage rights over *all lands* which might conceivably be affected by the plan during maximum or unusual floods. When read in the light of Section 3 we contend that Section 4 was not intended to provide for the acquisition of flowage rights over lands, such as that of the respondent, which in the past have been subject to repeated floods, but which under the proposed plan, might, upon the conjectured occurrence of maximum flood conditions, be flooded to a greater extent than they would be, the same flood conditions prevailing, with the situation remaining as it now is.

Light as to the legislative intent appears from an examination of the project adopted by the statute. The essential features of the Jadwin plan consist of the construction or utilization of certain lateral floodways, the setting back of levees in the main river channel at "bottle necks," the raising and strengthening of main channel levess, and the stabilization and improvement of navigation channels. The four main floodways contemplated by the plan are described in the plan as follows (Senate Report No. 619, 70th Cong., 1st Sess., pages 34–39):

ATCHAFALAYA BASIN FLOODWAY

> 103. The plan is * * * to have relief levees across the upper end of the Atchafalaya Basin which are to be maintained at their present grade, but which will fail when

the stage rises to their top. This will insure that all excess water predicted as possible, above the capacity (1,500,000 second-feet) of the leveed main river, leaves the river. In order to carry this excess water to the Gulf and limit the land overflowed, a leveed floodway will be constructed. * * *

* * * * * *

109. The control of the relief levees at the head of the Atchafalaya Basin must be under the authority of the United States. *The plan is to maintain them at their present elevation and strength.* * * * The proposed plan gives the river room to expand when in extraordinary flood but does not take away from the existing land owners any protection which they now have. (Italics ours.)

BONNET CARRE SPILLWAY

114. At Bonnet Carre a controlled spillway emptying into a leveed floodway to Lake Pontchartrain is to be constructed * * *

115. The Bonnet Carre spillway is so designed *as to afford complete control of the discharge into Lake Pontchartrain.* This discharge will be begun when the flood stage at New Orleans has reached 20 on the Carrollton gauge. It will be *regulated* to prevent the stage rising above 20, and will be cut off as soon as the stage has fallen below that figure. (Italics ours.)

BOEUF BASIN FLOODWAY

118. To insure that excess water will leave the main river, a fuse plug section of the levee in the vicinity of Cypress Creek *must be kept at its present strength and at its present grade,* viz, 3 feet below the new levee grade. * * *

119. The Boeuf River bottom is selected for this diversion because it is the most suitably located to receive the water, is the most direct route, has the best width, and covers largely undeveloped swamp land. Water will not top the Cypress Creek fuse plug levee and go down the floodway until it is so high that it must find an outlet. No flood except that of 1927 has reached such a stage. However, due to an increase in flood heights by reason of levee construction and drainage, it has been estimated that a stage over the present levee top at Cypress Creek might occur in the long run about once in 12 years. The lands in the floodway will be inundated only by floods that would overtop the present levee system, *and they will retain the same measure of protection that they now have.* (Italics ours.)

BIRDS POINT SETBACK FLOODWAY

125. *The plan is to set back, about 5 miles, the west bank Mississippi River levee* from Birds Point, opposite Cairo, to St. John Bayou, just east of New Madrid, 70 miles by river below Cairo, *and to lower the present river bank levee by 5 feet,* so that when the

> stage at Cairo reaches 55, the water will begin to flow into a wide floodway below. * * * (Italics ours.)

With respect to the lands included in the floodways, the plan states (Senate Report No. 619, *supra*, p. 19)—

> * * * the lands, with some exceptions, will have the same protection as is afforded by the present levee system, * * *. *The exceptions are the lands in the Bonnet Carre floodway and in the setback floodway from Birds Point to New Madrid.* The acquisition of flowage rights by the State or local interests may be necessary in these cases. (Italics ours.)

From the foregoing it will be seen that in the case of the Bonnet Carre spillway and the Birds Point setback floodway the plan contemplates the *deliberate diversion* of waters upon *lands not previously subject to destructive flood waters to the degree contemplated by the plan.* In the Bonnet Carre project engineering devices have been installed by which the amount of water to be admitted to the spillway can be controlled. The Birds Point project involves the setting back of the west-bank main-channel levee so as to give a larger main channel during high waters. As to lands involved in these projects the *present flood protection is to be eliminated or reduced.* A very different situation exists as to the Atchafalaya and Boeuf floodways. It is not contemplated that flood waters shall enter these channels until the main-channel levees at the

points of intersection are overtopped. As to lands within these basins, the *present flood protection is to be retained.*

In other words, the plan does not call for the deliberate diversion of flood waters into the Boeuf Basin through the fuse-plug levee. That levee, under the plan, is to "be kept at its present strength and at its present grade." Although the adjoining levees are to be raised 3 feet, the significant fact is that the Boeuf Basin will have the same levee protection that it now has.

Intentional diversion by physical structures adapted to that end, as contemplated by the Bonnet Carre and Birds Point projects, should be distinguished from *natural diversions* resulting from overflowed levees, which under the plan are to be kept at the present grade and strength, as contemplated by the Atchafalaya and Boeuf projects. In the one case the diversion is contemplated and orderly and is effected by engineering devices. In the other case the question is merely one of the flood waters overtopping the levee. Flood waters are not "diverted" from the main channel of the river except where, under the plan, an existing levee has been razed or lowered, thereby *aiding* such waters to get into the channels. Where water merely overtops a levee at its present grade and strength and flows into a *natural* basin or flood way, there has been no *diversion* of such waters.

We submit that the phrase "additional destructive flood waters that will pass by reason of diver-

sions" was intended to refer to situations where the proposed plan definitely contemplates deliberate diversions of destructive flood waters from the main channel, *through floodgates or lowered or eliminated levees, in such volume as to result in destruction of property which would not occur except by reason of the flood control project.* Such lands are those within the Bonnet Carre spillway and the Birds Point setback. By inserting the word "additional" in Section 4 we contend that Congress intended to prevent lands within the area of the Atchafalaya and Boeuf floodways, which under the express provisions of the plan adopted by the statute were to retain the same flood protection which they now have, from being within the purview of that section.

Further evidence that Congress did not intend to provide for the acquisition of flowage rights in the Boeuf and Atchafalaya Basins is found in the fact that the statute only authorized the appropriation of $325,000,000 for carrying out the project. But under the Jadwin Plan the expense of flood control and navigation works and structures alone was $296,400,000. This figure did not include any sum for lands or flowage rights in the Bonnet Carre controlled spillway or in the Birds Point set-back floodway. Nor did it include the expense of the lands or flowage rights provided for by the proviso to the last paragraph of Section 3. (See pp. 9–10, *supra;* p. 75, *infra.*) While the difference between

$296,400,000 and $325,000,000 may be sufficient to take care of the cost of flowage rights over these lands, which will certainly be needed and are within Section 4, it is obviously not sufficient to pay for flowage rights over approximately 4,000,000 acres within the Boeuf and Atchafalaya Basins. (See p. 26, *supra,* and pp. 41, 43, *infra.*) The fact that Congress provided no funds with which the Secretary of War might condemn flowage rights over lands within these two basins, is some evidence that the condemnation of such flowage rights was not contemplated.

We think it not without significance that the administrative interpretation of the statute has been in accord with the above construction. On August 13, 1928, the President approved the report of the Flood Control Board created by the statute (see R. 32), except "those parts which contemplate the acquiring of rights in land for constructing spillways and floodways." On November 21, 1928, the President approved the purchase of flowage rights within the area of the Bonnet Carre spillway. On December 11, 1928, the President approved the purchase of flowage rights over the land "between the existing riverside levee and the back (westward levee)" of the Birds Point floodway. On January 10, 1929, the President approved the construction of the protection levees in the Boeuf Basin and the acquisition of lands for rights of way *for these levees.* On January 16, 1929, the President authorized the construction of the protection levees

in the Atchafalaya Basin and the acquisition of rights of way *for such levees.* It should be noted that whereas the President directed the acquisition of flowage rights over lands in the Bonnet Carre and Birds Point floodways, he did not authorize the acquisition of flowage rights over lands in the Boeuf and Atchafalaya Basins.

This determination of the President would seem to possess unusual significance in view of the provision in Section 1 of the statute (pp. 72–73, *infra*) that—

> the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted.

The foregoing interpretation of the statute is supported by its legislative history. Section 4 of the Act, as originally submitted to the Senate by the Committee on Commerce, and as originally passed by the Senate, provided (Cong. Rec., Vol. 69, pp. 5483, 5491):

> SEC. 4. Just compensation shall be paid by the United States for all property used, taken, damaged, or destroyed in carrying out the flood-control plan provided for herein, including all property located within the area of the spillways, flood ways, or diversion channels herein provided, and the rights of way thereover, and the flowage rights thereon, * * *:

In presenting the bill, Senator Jones, Chairman of the Committee, said (Cong. Rec., Vol. 69, pp. 5485, 5486, 5487):

> We have provision in the bill for condemnation of rights of way, flowage rights, and so on. We feel that under the constitutional provision *no private property can be taken for public use without compensation.* We could not avoid that if we desired to do so. * * *
>
> * * * * *
>
> Mr. JONES. The proposition the Senator has in mind is involved in what is known as the Boeuf flood way, * * *. According to the Jadwin plan, the flood way would be several miles wide, * * *; but for a distance of 140 or 150 or 160 miles. Under the Jadwin plan it would cover, I think, over 2,000,000 acres of land.
>
> General Jadwin contends that that land is overflowed now, and that therefore there is a sort of natural flowage right, and there would be a question there for the courts to determine.
>
> * * * * *
>
> Mr. President, *section 4 provides for just compensation, and is framed on the theory of the constitutional provision that where property is taken for public use it must be paid for.* (Italics ours.)

Senator Jones's remarks indicate that in his opinion Section 4 was intended to provide for the acquisition of only such lands and rights of way as were required by the Constitution.

On April 2, 1928, the House Committee on Flood Control reported out the bill as passed by the Senate, with various amendments, but left Section 4 substantially as it was, in so far as the issue now under discussion is concerned. (House Report No. 1100, 70th Cong., 1st Sess.)

Representative Wilson, a member of the Flood Control Committee, in explaining Section 4 as it then was, said (Cong. Rec., Vol. 69, p. 6646):

> The bill also provides that just compensation shall be paid by the United States for the property taken, used, damaged, or destroyed in carrying out the works authorized, including property located within the areas of the spillways, flood ways, or diversion channels, or the uses thereof or flowage rights thereon.
>
> This is certainly a fair provision *and simply in accordance with the constitutional provision to the effect that private property can not be taken for public use without just compensation.* (Italics ours.)

Although sponsors of the bill thus indicated that in their opinion Section 4 required the Government to acquire only such lands and rights of way as were required under the Constitution, contrary views were expressed. Section 4 was vigorously attacked by Representative Frear, a member of the Flood Control Committee, and by other members of the House, upon the ground that it required the Government to acquire by condemnation or purchase the lands included within the Boeuf and

Atchafalaya floodways. Mr. Frear introduced in the Congressional Record an estimate of army engineers that if the areas included in the floodways had to be acquired by the Government the cost would run from $92,900,000 to $278,600,000, depending upon the value of the land. (Cong. Rec., Vol. 69, pp. 6655, 6657, 6659, 6660, 6712, 6718, 6999–7000.) Advocates of the bill replied that under Section 4, as then constituted, it would not be necessary for the Government to acquire the lands within the floodways outright, but merely flowage rights over such lands. (Cong. Rec., Vol. 69, pp. 6776–6777, 6788, 6795.)

Thereafter Mr. Reid and the Flood Control Committee agreed to add to Section 3 the following words (Cong. Rec., Vol. 69, p. 7022):

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place

and to substitute in lieu of the first paragraph of Section 4, as then constituted, the following (Cong. Rec., Vol. 69, p. 7104):

> The United States shall provide flowage rights for destructive flood waters that will pass by reason of diversion from the main channel of the Mississippi River, and shall control, confine, and regulate such diversion.

Representative Tilson immediately offered a substitute amendment as follows (Cong. Rec., Vol. 69, p. 7104):

> Any property taken by the United States for the purpose of carrying out the terms of this act for which compensation is required by the Constitution of the United States shall be paid for by the United States.

In commenting upon his new amendment Representative Reid said (Cong. Rec., Vol. 69, pp. 7105–7106):

> Mr. REID of Illinois. Mr. Chairman, I told you the first day that we agreed to everything that the President's representatives said they wanted except turning destructive flood waters down upon innocent people, and I stand to-day reiterating that same proposition. The only relief provided by the amendment that the gentleman from Connecticut [Mr. Tilson] proposes would give to a man after his property has been destroyed by the destructive flood, or probably some of his kin had been drowned, would be to say to him, "You go to the United States courts, start a lawsuit, and at the end of 5 or 10 years, perhaps, you will be thrown out, and then you will be able to come to Congress, and be sent to the Court of Claims, and after fussing around there for a year or two you will be forgotten."

Representative Cox, a member of the Committee, had a different view than Mr. Reid as to the effect of the proposed amendment (Cong. Rec., Vol. 69, pp. 7106–7107):

> I invite your careful attention to the amendment that the gentleman from Illinois has proposed. You will find from read-

> ing it that it does not undertake to commit the Government to purchase a single foot of land in any of the diversion ways or flood ways. It does not propose, and does not mean, that the Government shall acquire flowage rights for all of the land within the flood ways. *It simply means that where the turning in of this additional water inundating land not heretofore subject to overflow, the Government shall acquire flowage rights thereto.*
>
> * * * * *
>
> I do not understand that there is any question as to the right of the Government to turn the water in. The amendment simply proposes that when *the land is flooded that has not heretofore been subject to flood, the Government may acquire flowage rights.* (Italics ours.)

On April 24, 1928, the Tilson amendment was rejected and the Reid or committee amendment was agreed to by the House. (Cong. Rec., Vol. 69, pp. 7111, 7124–7125, 7133–7135.) The bill was then referred to a conference committee. In conference (House Report No. 1555, 70th Cong., 1st Sess., pp. 1, 2; Cong. Rec., Vol. 69, pp. 7962, 8118, 8172) the clause —

> No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: * * *

was left in Section 3, and in lieu of the first paragraph of Section 4, as passed by the House, the

Conference Report inserted the following (Cong. Rec., Vol. 69, p. 7687):

> SEC. 4. The United States shall provide flowage rights for *additional* destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River: * * * (Italics ours.)

The comment of the Conference Committee on the change was as follows (House Report No. 1555, *supra*, p. 5):

> SECTION 4
>
> No. 15: * * * inserts in lieu of the amendment proposed by the House a provision which has been agreed upon by the conferees, to the effect that the United States shall provide flowage rights for *additional* destructive flood waters that will pass by reason of diversions from the main channel of the Mississippi River. (Italics ours.)

In commenting upon the addition of the word "additional," Representative Frear said (Cong. Rec., Vol. 69, pp. 8120–8121):

> * * * Of course, the effect of this change is to strike out the enormous expenditure of two or three hundred million dollars for buying up whole flood ways that we have had in the bill heretofore.
>
> * * * * *
>
> Several specific amendments accepted by the conferees have been briefly referred to. Their adoption ought to materially reduce the cost estimate to an amount *not far in*

excess of the $300,000,000 in round numbers estimated for the General Jadwin plan of flood control rejected in its local contribution features by both House and Senate bills.

* * * * *

The conferees, according to the report, have changed section 4 in two particulars, as stated, first by inserting the word "additional" before the words "destructive flood waters," so that it is understood the Government will only be liable for any new or additional damages in the flood ways that may be occasioned by the construction of flood-control works. If this construction is correct—and it has been passed upon by the Attorney General—then it will avoid any necessity for purchasing the 4,000,000 acres of lands which have heretofore been subject to overflow. *Only a small fraction of such lands will be subjected to new overflow according to the engineers.* This was an indefensible objection to the Senate and House bill which is now eliminated. (Italics ours.)

Representative Reid, Chairman of the House Flood Control Committee, made the following statement (Cong. Rec., Vol. 69, p. 8122):

The next important section is the so-called flowage-rights section. I think we have the language corrected to meet the views of nearly everyone in the House. *The United States will not now have to pay for flowage rights over lands now used in conducting the destructive water from the main Missis-*

> *sippi River.* It was cured very simply by the addition of the word "additional." If the work puts any additional flood destruction on those lands, that must be provided for. * * *. (Italics ours.)

Representative Wilson made the following statement (Cong. Rec., Vol. 69, p. 821):

> Destructive flood waters is that volume which passes out of the natural channel; *additional destructive flood waters is that volume which is deliberately diverted on the plans of the Government over a section of the valley not overflowed in normal years.* (Italics ours.)

From the foregoing it can be seen that while there was some difference of opinion as to the precise effect of the insertion of the word "additional," it was generally understood that the change was intended to bring the statute into substantial alignment with the theory of the Jadwin plan, which was that it was not feasible or necessary to acquire flowage rights with respect to lands within the proposed Atchafalaya and Boeuf floodways. (See pp. 10, 11, 36, *supra.*) Even Representative Reid admitted that the United States "will not now have to pay for flowage rights over lands *now used in conducting the destructive water from the main Mississippi River.*" And Representative Wilson, another staunch supporter of the bill, defined "additional destructive flood waters" as "that volume *which is deliberately diverted*

* * * over a section of the valley not overflowed in normal years."

Since the evidence clearly establishes that the respondent's land, and the Boeuf Basin generally, has been subject to repeated flooding,[1] such land is accurately described in the language of Representative Reid as "lands now used in conducting the destructive water from the main Mississippi River." And since the proposed plan does not contemplate that flood waters will enter upon respondent's land until the existing levees have been overtopped, it does not contemplate a "deliberate diversion" upon such land.

It may be that the Secretary of War possesses the power, under Section 4, to condemn or purchase flowage rights even over the lands in Boeuf Basin, if in his opinion and that of the Chief of Engineers such rights are needed, but it seems clear from the statute and its legislative history that the first paragraph of Section 4 was not intended to have any general application to the respondent's land and other land similarly situated. Moreover, as pointed out above (pp. 38-39, *supra*), no money has been appropriated or authorized so as to permit the Secretary to condemn flowage rights in the Boeuf Basin.

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[1] The respondent's land was partially or wholly flooded six times during the period from 1912 to 1927. (See p. 14, *supra*.)

C. Assuming that the first paragraph of Section 4 is applicable to the respondent's land, neither the findings of the trial court nor the evidence sustain the conclusion of the court that the flood control plan will result in "diversions" of "additional destructive flood waters" upon the respondent's land.

Disregarding the contention made above that Section 4 was drafted in the light of the fundamental distinction between the Bonnet Carre and Birds Point projects, on the one hand, and the Atchafalaya and Boeuf projects, on the other, and assuming that Section 4 should be interpreted to require the acquisition of flowage rights over all lands which under the plan will be overflowed with destructive waters to a greater extent than would be the case with the situation as it now is, we contend that neither the findings of the District Court nor the evidence establish that Section 4 is applicable to the respondent's land.

The District Court has found that, upon consummation of the plan, and *with "maximum flood conditions" prevailing,* more water will overflow the respondent's land than would be the case with the flood protection of the Boeuf Basin remaining as it now is. This finding was made solely upon the assumption of the *happening of the maximum possible flood.* (R. 119, 122.) There is no record of such a flood ever having happened in the Mississippi Valley,* and the court made no finding as

* The flood of 1927 was the maximum flood of record. The Jadwin plan is prepared upon the basis of caring for a flood 25% greater than the 1927 flood. (Senate Report No. 619, *supra*, pp. 2, 15.)

to when or how frequently such a flood might occur. What would be the result so far as the respondent's land is concerned, in the event of a flood such as the 1927 flood, which was much less severe than the "maximum flood," or what would be the result in the event of floods like those of 1912, 1913, 1916, and 1922, all of which resulted in the overflow of respondent's land (R. 33, 52, 55, 71, 114), *does not appear from the court's findings.*

Although the court found that flood waters which during the 1927 and other floods had escaped from the main channel by various exits or crevasses would, under the plan, flow into the Boeuf Basin, and that waters which used to flow down the Tensas (Macon) Basin would flow down the Boeuf Basin (R. 122), the court did not find that under the plan the respondent's land would be overflowed *more frequently* or *for longer periods* than is now the case; it did not find that over any given period of time *more water* would overflow the respondent's land under the plan than during a like period with the plan not in operation; it did not find that under the plan the respondent would be able to cultivate his land less extensively than has been the case in the past; it did not find that the waters which would reach the respondent's land under the plan would cause greater damage or destruction than the waters which have covered the respondent's land in the past; it merely found that under *maximum flood conditions* more water would

go upon the land than if the plan proposed were not put into operation.

If the question of fact to be decided is whether, under the plan, *more* destructive waters will reach the respondent's land than has been the case in the past, such fact is not established by general findings that (1) the plan contemplates that waters which used to leave the river by various exits will now find these exits closed and so can escape only at Cypress Creek, and (2) that under maximum flood conditions, which have never yet occurred, more water will reach the respondent's land under the plan than without the plan in operation. Accordingly, we submit that, accepting the findings of fact of the District Court as now incontrovertible, such findings do not sustain the *legal conclusion* of the court (R. 122) that under the plan "additional destructive flood waters" will be "diverted" upon respondent's land.*

Under these circumstances the petitioners are not foreclosed from relying upon the evidence introduced by them that lands between the guide levees in the Boeuf Basin would continue to have, under the plan, the same protection which they now have (R. 80, 102); that under the plan when completed the respondent's land would not be flooded more often than once in twelve or thirteen years (R. 78, 103, 106, 108, 114); that consummation

* The finding of the District Court that under the plan "additional destructive flood waters" will be "diverted" upon respondent's land is not a finding of *fact*. See *Jackson v. United States*, 230 U. S. 1, 18.

of the plan would have no harmful effect upon respondent's land (R. 77, 78, 106); that construction of the guide levees in the Boeuf Basin would tend to restrain flood waters from leaving the main channel, and would not necessarily force more water upon the respondent's land (R. 77–78, 102, 108, 114); that less water would enter the Boeuf Basin from the main channel of the Mississippi River than under present conditions (R. 78, 79, 102, 107, 109, 112, 113); and that the carrying capacity of the main channel of the river would, under the plan, be tremendously improved by revetment work and otherwise, so that when the plan is conpleted the main channel of the river will be able to carry much more water than is now the case (R. 81, 97, 99, 102, 106, 107, 114).*

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* The witnesses upon whose testimony the foregoing statements are based are engineers of outstanding ability and national reputation, and the foremost authorities upon flood control. They include Captain John Paul Dean, U. S. Corps of Engineers and assistant to resident members of the Mississippi River Commission in Washington, and one of the men chiefly responsible for the preparation of the Jadwin plan (R. 74); Colonel Ernest Graves, member of the Mississippi River Commission, assistant in the office of the Chief of Engineers, and member of the Inter-Oceanic Canal Board (R. 99); General Thomas H. Jackson, President of the Mississippi River Commission and member of the Flood Control Board created by the Flood Control Act and ranking officer of the Engineer Corps (R. 105); Edgar S. Maupin, U. S. Engineer Corps, now engaged in the construction of levees along the Mississippi River (R. 113).

In his testimony Captain Dean stated (R. 78, 80):

"* * * The result of this is that under no circumstances can levees to the north or upstream of Mr. Kincaid's

Accordingly, we submit that even if Section 4 is applicable generally to lands within the Boeuf Basin, neither the findings of the District Court nor the evidence establish that the flood control plan will result in the "diversion" of "additional destructive flood waters" upon the respondent's land.

II

ASSUMING THAT THE RESPONDENT IS ENTITLED TO COMPENSATION, HE IS NOT ENTITLED TO ENJOIN THE PROSECUTION OF WORK ON THE FLOOD CONTROL PROJECT IN THE BOEUF BASIN UNTIL SUCH COMPENSATION IS PAID

Assuming that Section 4 of the statute requires the United States to acquire flowage rights over the

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property within the State of Louisiana be considered as having any effect on raising Mr. Kincaid's water levels, due to restricted channels, but rather would slightly tend to decrease the water levels on Mr. Kincaid's property, due to their restraining influence on the entrance of waters from outside of the State of Louisiana. * * *

* * * * *

"There is not the slightest doubt but what less water will pass from the main river by reason of the adopted project.

* * * * *

"The carrying capacity of the Mississippi River is very materially improving. * * * This project provides for eighty million dollars of revetment work; over one-fourth of the entire project goes into revetment work alone, and that is certainly going to materially improve the carrying capacity of the river.

"The side levees in Louisiana can only have a tendency to decrease the amount of water coming on Mr. Kincaid's property by restricting the amount of water passing into Louisiana by the head being reduced. It is impossible for water to escape laterally from the Boeuf Valley. It is manifest you will get less water on Mr. Kincaid's property by virtue of the presence of the guide levees in Louisiana."

respondent's land, there is nothing in the statute which contemplates that such rights must be acquired as a condition precedent to proceeding with the construction of the proposed works, or which permits any owner of land within the Boeuf Basin to stop the work of construction until flowage rights over his land have been acquired.

We have already considered under Point I, pp. 23–30, *supra*, the provision of Section 4 of the statute which directs that—

> The Secretary of War *may* cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way *which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project*, * * *. (Italics ours.)

In unequivocal terms Section 4 authorizes and permits the condemnation of *only* such flowage rights as "in the opinion of the Secretary of War and Chief of Engineers, are needed in carrying out this project." We contend that this language limits and defines the *right* of any landowner, within the limits of the Fifth Amendment to the Federal Constitution, to collect compensation for damages resulting from diversions of additional destructive flood waters upon his land. In other words, we assert that the statute requires the United States to "provide" *only such flowage rights* as the Secretary and the Chief of Engineers find to be necessary in carrying out the project.

But for purposes of the instant case the petitioners' argument need not go so far. Here we may assume that the language quoted was not intended to limit the *right* of any landowner to *compensation,* and that, under Section 4, if the Secretary of War and the Chief of Engineers fail to condemn or purchase flowage rights which the statute directs the United States to "provide," the landowner can assert a claim against the United States for the value of such rights.[1] But such a claim must be asserted *against the United States* and can not be asserted *against the petitioners in this suit.*

If the respondent is correct in his contention that the Flood Control Act provides for the payment to him of the value of flowage rights over his land *in spite of the fact that the Secretary of War and the Chief of Engineers have not determined that such rights are needed,* the respondent has an adequate remedy at law. Upon the facts stated an implied contract would exist which would permit him to sue the United States in the Court of Claims, or in the District Court under the Tucker Act, for the

[1] This was the view of at least one member of Congress. Representative Whittington expressed his opinion as to the meaning of the second paragraph of Section 4, as it was finally enacted, as follows (Cong. Rec., Vol. 69, pp. 7889):

"Again, the bill as agreed to by the conferees is carefully drawn. The Chief of Engineers and the Secretary of War are the judges as to what flowage rights shall be acquired. If they acquire none—if they think that none should be acquired—the diversion will not be delayed, for the property owners will not be without remedy. They can sue, and the Constitution fixes the measure of their damages."

value of such flowage rights. *Portsmouth Co.* v. *United States*, 260 U. S. 327, 330; *Cramp & Sons* v. *Curtis Turbine Co.*, 246 U. S. 28, 40–41; *Peabody* v. *United States*, 231 U. S. 530, 538–539; *United States* v. *Lynah*, 188 U. S. 445, 464–466; *Ferris* v. *Wilbur*, 27 F. (2d) 262, 264 (C. C. A. 4th).

But if it be arguable whether Section 4 limits the right to compensation, it is entirely clear that Section 4 permits *the bringing of condemnation proceedings for and the purchase of flowage rights* only when, in the opinion of the Secretary, and the Chief of Engineers, such flowage rights are needed. The statute will admit of no other construction. Unless the Secretary and the Chief of Engineers determine that flowage rights are needed *the statute does not authorize the institution of condemnation proceedings for or the purchase of flowage rights.*

When the Secretary of War and the Chief of Engineers have determined, by an exercise of the power vested in them, that flowage rights over certain lands are not needed in carrying out the flood control project, a court can not substitute its opinion for that of the officers, and, in effect, force such officers to institute condemnation proceedings for or to purchase such rights. *Louisiana* v. *McAdoo*, 234 U. S. 627, 633–634; see Pomeroy, Equity Jurisprudence (4th Ed.), p. 4062. The repeated decisions of this Court establish that the exercise in good faith by these officers of the power delegated to them by the statute cannot be reviewed by the

courts. (See cases p. 28, *supra.*) The respondent has failed to show that in the opinion of the Secretary and the Chief of Engineers flowage rights over his land are needed. The District Court has attempted, by the issuance of its injunction, to force the Secretary and the Chief of Engineers to condemn or purchase flowage rights over the respondent's land. The District Court was without power thus to substitute its opinion for that of the officers designated by the statute.

It is not suggested by the respondent that, except as the petitioners have failed to acquire flowage rights over the respondent's land, the petitioners are proceeding contrary to the Flood Control Act. Nor is it suggested by the respondent that the *statute* is unconstitutional. Since the petitioners were acting in accordance with a lawful statute, which can not properly be interpreted to require the United States to acquire flowage rights over lands affected by the plan *in advance of construction,* in the absence of a determination by the Secretary of War and the Chief of Engineers that such rights are needed, no basis exists for enjoining the petitioners from going ahead with the project in the Boeuf Basin.

The foregoing argument is predicated upon the assumption that the respondent is entitled to compensation under the Flood Control Act. But even assuming that the flood control project threatens the respondent with a taking of his property for

which he is entitled to compensation under the Fifth Amendment to the Federal Constitution, the injunction granted by the District Court was not warranted.

If the statute is constitutional, as was assumed by the District Court (R. 25), and as conceded by the respondent,* the fact that the *execution of the project* will result in a taking of the respondent's property will, of course, entitle him to recover such compensation in a proper action against the United States, but such fact affords no basis for invoking the injunctive process of a court of equity to hold up the entire flood-control project in the Boeuf Basin until such compensation has been paid.

The Government contends that nothing which the petitioners have done or propose to do consti-

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* The respondent makes no attack upon the flood-control plan as such, and does not question the constitutionality of the Act. (R. 15, 31, 96.) His contention apparently is that unless Section 4 of the statute is construed as requiring the acquisition of flowage rights over his land before construction of the proposed levees in the Boeuf Basin is begun, the execution of the plan will result in a taking of his property without compensation in violation of the Fifth Amendment. Although the District Court in its first opinion assumed, almost as a matter of course, that the statute was constitutional (R. 25), in its opinion upon the merits the court seems to have taken the position that unless Section 4 is construed as requiring the acquisition of flowage rights in advance of construction the *statute* would be unconstitutional. (R. 123–124.) But it is now too late to contend that the just compensation provision of the Fifth Amendment requires such compensation to be ascertained and paid in advance of a taking of private property for a public purpose. *Sweet* v. *Rechel*, 159 U. S. 380; *Crozier* v. *Krupp*, 224 U. S. 290, 306.

tutes a "taking" of the respondent's property within the meaning of the Fifth Amendment. It will be years before the flood control project is completed, and then it is highly conjectural when, if ever, a flood of sufficient severity will occur to cause an overflow upon the respondent's land. No actual physical invasion or appropriation of respondent's land has occurred or is about to occur. It is not shown that construction of the levees in question has been started or even that land has been acquired upon which to construct them. All that appears is that the United States has advertised and received bids for the construction of certain parts of the work to be performed in the Boeuf Basin. (R. 31.) Neither the awarding of contracts for the construction of the proposed works, nor even the actual construction thereof, will constitute a physical appropriation of respondent's land.

Moreover, the respondent's use of his land has not been interfered with. Although the District Court found that the acts already undertaken by the petitioners have, "for the present at least, affected materially the sale and mortgage value of property between the proposed levees" (R. 125), it did not explain in what manner the value of the land had been "affected." The respondent conceded that he has made no attempt since the enactment of the Flood Control Act to sell his land or to secure a loan thereon. (R. 34.)

The foregoing facts do not establish a "taking" of the respondent's property. In applying the just compensation provision of the Fifth Amendment a distinction must be made between *damage* and a *taking*. This Court has frequently held, with respect to claims of damage arising from the construction of public improvements, that there must be "an actual, permanent invasion of the land, amounting to an appropriation of and not merely in injury to the property," before there is a taking of property within the meaning of the Fifth Amendment.[9] *Sanguinetti* v. *United States*, 264 U. S. 146, 149; *Transportation Co.* v. *Chicago*, 99 U. S. 635; *Gibson* v. *United States*, 166 U. S. 269; *Bedford* v. *United States*, 192 U. S. 217, 225; *Manigault* v. *Springs*, 199 U. S. 473, 481–485, Cf. *Peabody* v. *United States*, 231 U. S. 539; *Willink* v. *United States*, 240 U. S. 572, 579. Specifically with reference to injury to property from flood waters, it is established that there is a taking only "where the Government by the construction of * * * public works so floods land belonging to an individual as to substantially destroy their value." *United States* v. *Lynah*, 188 U. S. 445,

[9] In the report of the special master in *Wisconsin* v. *Illinois*, 281 U. S. 179 (House Doc. No. 178, 70th Cong., 1st Sess., pp. 79–80), it is said:

"The causing of incidental damage through the exercise of the constitutional authority of Congress does not constitute a taking of property for public use. In the discretion of Congress, and through administrative action which Congress authorizes, structures may be erected in the beds of

470; *High Bridge Lumber Co.* v. *United States,* 69 Fed. 320, 324–5 (C. C. A. 6th); *Coleman* v. *United States,* 181 Fed. 599 (C. C. N. D. Ala.).

The doctrine of the decisions above cited has received application in cases which appear to be essentially similar to the instant case. This Court has held that the United States is not liable for damages caused by overflow of lands in the Mississippi Valley caused by the levees constructed by State and Federal authority for protection from overflow and improvement of navigation, and that such overflow does not amount to a taking of property within the Fifth Amendment. *Jackson* v. *United States,* 230 U. S. 1; *Hughes* v. *United States,* 230 U. S. 24; *Cubbins* v. *Mississippi River Commission,* 241 U. S. 351.

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navigable waters, jetties may be constructed, channels may be altered, navigators may be required to pass within a prescribed channel, and other channels may be closed, dikes may be built which interfere with, or cut off, accessibility to navigable waters, harbor lines may be laid down and regulating works constructed which preclude uses and improvements of property, otherwise possible and valuable, and riparian proprietors have no ground for complaint by reason of the actual, but incidental, damage thus sustained, for the reason that their ownership is subject to the servitude of the exercise of the governmental power. It is a case of damnum absque injuria. * * *.

* * * * *

"Where, pursuant to governmental authorization otherwise valid, there is an abstraction of water from navigable lakes and rivers and a consequent lowering of levels by enlarging or opening outlets, the incidental damage to riparian owners affords no ground for asserting the constitutional invalidity of that action. * * *."

The District Court seemed to be of the opinion that the doctrine of the *Cubbins* and *Jackson cases* was not applicable to the instant case, for the reason that the purpose of the Flood Control Plan is not the improvement of navigation, but the prevention of floods.[10]

A short answer to this argument is that one of the essential features of the flood control project is "channel stabilization and navigation improvement." (Senate Report No. 619, 70th Cong., 1st Sess., pp. 13, 14.) But the Government has no more right to take such property as is here involved without compensation where it constructs works in aid of navigation than in the pursuit of any other public enterprise. The Fifth Amendment is plainly a limitation upon the exercise of any power of the Federal Government. *C. B. & Q. Ry.* v. *Drainage Commissioners,* 200 U. S. 561, 593.

In *Manigault* v. *Springs,* 199 U. S. 473, 485, *supra,* the court said:

> We have repeatedly held that where the Government of the United States has for the purposes of improving the navigation of a river erected piers or other structures by

[10] The District Court said (R. 114):

"But when the Government departed from the policy of building levees and other public works for the purpose of commerce and navigation alone and expressly entered the field of controlling floods for the protection and reclamation of private lands, then it became engaged in activities which make it responsible for the invasion of private rights. * * *"

> which access to plaintiff's land is rendered more difficult there is no claim for compensation. * * * We see no reason why the same principle should not apply to cases where the state legislature, exercising its police power, directs a certain dam to be built, and thereby incidentally impairs access to lands above the dam. In both cases the sovereign is exercising its constitutional right—in one case in improving the navigation of the river, and in the other in draining its low lands, and thereby enhancing their value for agricultural purposes.

The cases above cited show that the construction by the Government of levees along the river which have resulted in raising the flood stages between the levees, or on the opposite side of the river where there were no levees, or in the back-water areas, does not impose any liability upon the United States. The control works and levees contemplated by the Flood Control Act are integral parts of the same levee system involved in the *Cubbins* and *Jackson cases*. If damages result from the consummation of this new plan, the cases cited show that this damage imposes no liability upon the United States.

But assuming that the respondent has suffered or will suffer injury to his land from the flood-control project which entitles him to compensation, he has not made out a case for equitable relief.

As has been pointed out, no actual physical invasion or appropriation of the respondent's land has occurred or is about to occur, and, viewing the findings of the District Court in their most favorable light as to the respondent, the only presently existing damage which is asserted or established is that the mortgage and sale value of the respondent's land has been affected by the proposed plan. The decision of the District Court, granting the injunction sought by the respondent, is predicated upon the assumption that when the proposed works in the Boeuf Basin are constructed, a situation will be created whereby, if floods of sufficient severity occur, the respondent's land will be overflowed and damaged, and upon the further assumption that if "maximum flood conditions" prevail, the land will be overflowed and damaged to a greater degree than it would be if the proposed levees were not constructed. Obviously the questions whether the respondent's land will ever be actually overflowed, and when this overflow will occur, and the extent of the overflow, turn on meteorological conditions, of rainfall and otherwise, the character of which can not now be predicted.

Under these circumstances we submit that the respondent's bill of complaint was not based upon any actual or threatened impairment of his rights, but "upon assumed potential invasions." *Arizona* v. *California*, 283 U. S. 423, 462. The respondent's suit is for an injunction, and, as pointed out by

this Court in *New York* v. *Illinois*, 274 U. S. 488, 489, 490, this is "a form of relief which must rest on an actual and presently threatened interference with the rights of another." Cf. *New Jersey* v. *Sargent*, 269 U. S. 328.

Moreover, it is well established that where there has been no actual appropriation or physical invasion of one's property by reason of the construction of an authorized public improvement, an injunction will not ordinarily issue to interfere with the consummation of such project. *Manigault* v. *Springs*, 199 U. S. 473; *Osborne* v. *Missouri Pacific Ry.*, 147 U. S. 248, 259; *Sears* v. *City of Akron*, 246 U. S. 242; *High Bridge Lumber Co.* v. *United States*, 69 Fed. 320, 326–327 (C. C. A. 6th); *Blodgett* v. *Northwestern El. R. Co.*, 80 Fed. 601 (C. C. A. 7th); *Childs* v. *City of Chicago*, 279 Ill. 623; *Lemon* v. *Drainage District*, 310 Mo. 171, 179. The theory underlying these cases is that the peculiar nature of works of public importance and the possibility of serious injury that may result from interference therewith requires that the jurisdiction to enjoin such works be exercised with the greatest caution and only when necessary to prevent irreparable injury.

In *Manigault* v. *Springs*, 199 U. S. 473, *supra*, the defendants were authorized by a state statute to erect a dam across a stream. The statute provided that they should be liable for all damage caused by erection of the dam. The plaintiff sued to enjoin the construction of the dam on the ground

that it would cause the stream to overflow his land. Although this Court found that the erection of the dam would injure the plaintiff's land, it denied an injunction and said (p. 485)—

> a court of equity is not bound to enjoin a public work authorized by statute, until compensation is paid, *where no property is directly appropriated.* This is particularly true where the damage is difficult of ascertainment at the time and a reasonable provision is made by the law for compensation. (Italics ours.)

In *Kirk* v. *Good et al.* (Appendix B, pp. 83–85, *infra*), which was a case substantially like the instant case, District Judge Davis said:

> The awarding of the contracts for the construction of the set-back levee, and the execution of said contracts are not alleged to result in the appropriation, and will not in fact result in the taking of any part of plaintiff's land. The effects of the adoption of the flood-control plan of which plaintiff now complains, viz, the inability to sell his property or to borrow money on the security thereof, are mere consequential damages such as the prospective construction of any great public work is likely to entail, and for which relief is not afforded. Therefore, the remedy of injunction, if otherwise available, is foreclosed.

Accordingly, even if the respondent is entitled to compensation as a result of injury to his land consequent to the flood control plan, he is not entitled

to the injunctive process of a court of equity for the purpose of preventing the consummation of the entire flood control project until such compensation has been paid. His remedy is not a suit against the petitioners but against the United States in the Court of Claims. See cases, p. 57, *supra*.

III

IF THE PETITIONERS WERE NOT ACTING ILLEGALLY, THE DISTRICT COURT WAS WITHOUT JURISDICTION TO ENTERTAIN THIS ACTION SINCE THE UNITED STATES WAS AN INDISPENSABLE PARTY THERETO AND HAD NOT CONSENTED TO BE SUED

Although the bill of complaint was expressly directed "against the United States Government" (R. 1), the District Court held that the United States was not a necessary or proper party and that it should be dismissed from the suit (R. 16). This decision was predicated upon the assumption by the District Court that the petitioners were "proceeding in the face of both the statute and the Constitution." (R. 15.) But if the petitioners are right in their contention that there has been no taking of or damage to respondent's property for which he is entitled to compensation, or in their contention that the Flood Control Act does not make the acquisition of any "flowage rights" therein directed to be secured a condition precedent to beginning work on the flood-control plan unless the Secretary of War and the Chief of Engineers have first determined that such flowage rights are "needed," then the pe-

titioners were not acting in violation of the Constitution or of the statute. If the petitioners were not acting illegally, no cause of action against them as individuals existed, and the United States was an indispensable party to the suit.

It has been held that even though the United States is not named as a party the action is one against the United States where the individual defendants have no personal interest in the controversy, where the relief sought is against the named defendants only in their official capacity, and where the United States is "the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates." *In re Ayres,* 123 U. S. 443, 506; *Belknap* v. *Schild,* 161 U. S. 10, 25; *Minnesota* v. *Hitchcock,* 185 U. S. 373, 386.

It is well established that the United States is an indispensable party if the action is one which may "interfere with the performance of governmental functions and vitally affect interests of the United States." *Morrison* v. *Work,* 266 U. S. 481, 485–486; *Lambert Co.* v. *Balto. & Ohio R. R. Co.,* 258 U. S. 377, 383; *Hopkins* v. *Clemson College,* 221 U. S. 636, 642; *Louisiana* v. *Garfield,* 211 U. S. 70, 77–78; *Oregon* v. *Hitchcock,* 202 U. S. 60, 62; *Belknap* v. *Schild,* 161 U. S. 10, 18; *New York Guaranty Co.* v. *Steele,* 134 U. S. 230, 232.

The relief sought against the defendants other than the United States was sought against them only in their official capacity. They had no indi-

vidual interest in the controversy, and assuming that their acts were authorized and directed by the statute, as we contend, they were under no personal liability for the performance of their duties. The effect of the decree entered by the District Court is to suspend the operation of an act of Congress and to inhibit the accomplishment of a governmental function of the greatest importance. Under the decree it is necessary for the "*United States Government*" (R. 130, 131) to take affirmative action to acquire flowage rights not only in the respondent's land but in many thousands of acres of other land located in the Boeuf Basin. Thus the present suit is one which "vitally affects the interests of the United States," and the United States was an indispensable party.

Accordingly, the bill of complaint should have been dismissed since the United States has not given its consent to be sued. *Kansas* v. *United States*, 204 U. S. 331, 333; *Louisiana* v. *McAdoo*, 234 U. S. 627, 628–629.

CONCLUSION

The effect of the decision of the court below, if sustained by this Court, will be to require the United States to acquire, at a probable cost of several hundred million dollars, flowage rights over a major portion of the approximately 4,000,000 acres of land within the Atchafalaya and Boeuf floodways. The Flood Control Act should not be construed so as to impose such liabilities upon the

Government in the absence of a clear and unmistakable intent upon the part of Congress to assume them. The statute and its legislative history indicate a contrary intention.

But even assuming that the statute requires the United States to pay for flowage rights over the respondent's land, or that the flood-control plan may eventually result in a taking of respondent's property for which he is entitled to just compensation, the respondent has not made out a case for equitable relief.

The judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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DECEMBER, 1931.

APPENDIX A

The Mississippi River Flood Control Act of May 15, 1928, c. 569, 45 Stat. 534 (U. S. C. Sup. V., Title 33, Secs. 702a–702m, 704), provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the project for the flood control of the Mississippi River in its alluvial valley and for its improvement from the Head of Passes to Cape Girardeau, Missouri, in accordance with the engineering plan set forth and recommended in the report submitted by the Chief of Engineers to the Secretary of War dated December 1, 1927, and printed in House Document Numbered 90, Seventieth Congress, first session, is hereby adopted and authorized to be prosecuted under the direction of the Secretary of War and the supervision of the Chief of Engineers: *Provided,* That a board to consist of the Chief of Engineers, the president of the Mississippi River Commission, and a civil engineer chosen from civil life to be appointed by the President, by and with the advice and consent of the Senate, whose compensation shall be fixed by the President and be paid out of the appropriations made to carry on this project, is hereby created; and such board is authorized and directed to consider the engineering differences between the adopted project and the plans recommended by the Mississippi River Commission in its special report dated November 28, 1927, and after such study and such further surveys as may

be necessary, to recommend to the President such action as it may deem necessary to be taken in respect to such engineering differences and the decision of the President upon all recommendations or questions submitted to him by such board shall be followed in carrying out the project herein adopted. The board shall not have any power or authority in respect to such project except as hereinbefore provided. Such project and the changes therein, if any, shall be executed in accordance with the provisions of section 8 of this Act. Such surveys shall be made between Baton Rouge, Louisiana, and Cape Girardeau, Missouri, as the board may deem necessary to enable it to ascertain and determine the best method of securing flood relief in addition to levees, before any flood-control works other than levees and revetments are undertaken on that portion of the river: *Provided,* That all diversion works and outlets constructed under the provisions of this Act shall be built in a manner and of a character which will fully and amply protect the adjacent lands: *Provided further,* That pending completion of any floodway, spillway, or diversion channel, the areas within the same shall be given the same degree of protection as is afforded by levees on the west side of the river contiguous to the levee at the head of said floodway, but nothing herein shall prevent, postpone, delay, or in anywise interfere with the execution of that part of the project on the east side of the river, including raising, strengthening, and enlarging the levees on the east side of the river. The sum of $325,000,000 is hereby authorized to be appropriated for this purpose.

All unexpended balances of appropriations heretofore made for prosecuting work

of flood control on the Mississippi River in accordance with the provisions of the Flood Control Acts approved March 1, 1917, and March 4, 1923, are hereby made available for expenditure under the provisions of this Act, except section 13.

SEC. 2. That it is hereby declared to be the sense of Congress that the principle of local contribution toward the cost of flood-control work, which has been incorporated in all previous national legislation on the subject, is sound, as recognizing the special interest of the local population in its own protection, and as a means of preventing inordinate requests for unjustified items of work having no material national interest. As a full compliance with this principle in view of the great expenditure estimated at approximately $292,000,000, heretofore made by the local interests in the alluvial valley of the Mississippi River for protection against the floods of that river; in view of the extent of national concern in the control of these floods in the interests of national prosperity, the flow of interstate commerce, and the movement of the United States mails; and in view of the gigantic scale of the project, involving flood waters of a volume and flowing from a drainage area largely outside the States most affected, and far exceeding those of any other river in the United States, no local contribution to the project herein adopted is required.

SEC. 3. Except when authorized by the Secretary of War upon the recommendation of the Chief of Engineers, no money appropriated under authority of this Act shall be expended on the construction of any item of the project until the States or levee districts have given assurances satisfactory to

the Secretary of War that they will (a) maintain all flood-control works after their completion, except controlling and regulating spillway structures, including special relief levees; maintenance includes normally such matters as cutting grass, removal of weeds, local drainage, and minor repairs of main river levees; (b) agree to accept land turned over to them under the provisions of section 4; (c) provide without cost to the United States, all rights of way for levee foundations and levees on the main stem of the Mississippi River between Cape Girardeau, Missouri, and the Head of Passes.

No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or flood waters at any place: *Provided, however,* That if in carrying out the purposes of this Act it shall be found that upon any stretch of the banks of the Mississippi River it is impracticable to construct levees, either because such construction is not economically justified or because such construction would unreasonably restrict the flood channel, and lands in such stretch of the river are subjected to overflow and damage which are not now overflowed or damaged by reason of the construction of levees on the opposite banks of the river it shall be the duty of the Secretary of War and the Chief of Engineers to institute proceedings on behalf of the United States Government to acquire either the absolute ownership of the lands so subjected to overflow and damage or floodage rights over such lands.

SEC. 4. The United States shall provide flowage rights for additional destructive flood waters that will pass by reason of diversions from the main channel of the Mis-

sissippi River: *Provided,* That in all cases where the execution of the flood-control plan herein adopted results in benefits to property such benefits shall be taken into consideration by way of reducing the amount of compensation to be paid.

The Secretary of War may cause proceedings to be instituted for the acquirement by condemnation of any lands, easements, or rights of way which, in the opinion of the Secretary of War and the Chief of Engineers, are needed in carrying out this project, the said proceedings to be instituted in the United States district court for the district in which the land, easement, or right of way is located. In all such proceedings the court, for the purpose of ascertaining the value of the property and assessing the compensation to be paid, shall appoint three commissioners, whose award, when confirmed by the court, shall be final. When the owner of any land, easement, or right of way shall fix a price for the same which, in the opinion of the Secretary of War is reasonable, he may purchase the same at such price; and the Secretary of War is also authorized to accept donations of lands, easements, and rights of way required for this project. The provisions of sections 5 and 6 of the River and Harbor Act of July 18, 1918, are hereby made applicable to the acquisition of lands, easements, or rights of way needed for works of flood control: *Provided,* That any land acquired under the provisions of this section shall be turned over without cost to the ownership of States or local interests.

SEC. 5. Subject to the approval of the heads of the several executive departments concerned, the Secretary of War, on the

recommendation of the Chief of Engineers, may engage the services and assistance of the Coast and Geodetic Survey, the Geological Survey, or other mapping agencies of the Government, in the preparation of maps required in furtherance of this project, and funds to pay for such services may be allotted from appropriations made under authority of this Act.

SEC. 6. Funds appropriated under authority of section 1 of this Act may be expended for the prosecution of such works for the control of the floods of the Mississippi River as have heretofore been authorized and are not included in the present project, including levee work on the Mississippi River between Rock Island, Illinois, and Cape Girardeau, Missouri, and on the outlets and tributaries of the Mississippi River between Rock Island and Head of Passes in so far as such outlets or tributaries are affected by the backwaters of the Mississippi: *Provided,* That for such work on the Mississippi River between Rock Island, Illinois, and Cape Girardeau, Missouri, and on such tributaries the States or levee districts shall provide rights of way without cost to the United States, contribute 33⅓ per centum of the costs of the works, and maintain them after completion: *And provided further,* That not more than $10,000,000 of the sums authorized in section 1 of this Act shall be expended under the provisions of this section.

In an emergency, funds appropriated under authority of section 1 of this Act may be expended for the maintenance of any levee when it is demonstrated to the satisfaction of the Secretary of War that the levee can not be adequately maintained by the State or levee district.

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SEC. 7. That the sum of $5,000,000 is authorized to be appropriated as an emergency fund to be allotted by the Secretary of War on the recommendation of the Chief of Engineers, in rescue work or in the repair or maintenance of any flood-control work on any tributaries of the Mississippi River threatened or destroyed by flood including the flood of 1927.

SEC. 8. The project herein authorized shall be prosecuted by the Mississippi River Commission under the direction of the Secretary of War and supervision of the Chief of Engineers and subject to the provisions of this Act. It shall perform such functions and through such agencies as they shall designate after consultation and discussion with the president of the commission. For all other purposes the existing laws governing the constitution and activities of the commission shall remain unchanged. The commission shall make inspection trips of such frequency and duration as will enable it to acquire first-hand information as to conditions and problems germane to the matter of flood control within the area of its jurisdiction; and on such trips of inspection ample opportunity for hearings and suggestions shall be afforded persons affected by or interested in such problems. The president of the commission shall be the executive officer thereof and shall have the qualifications now prescribed by law for the Assistant Chief of Engineers, shall have the title brigadier general, Corps of Engineers, and shall have the rank, pay, and allowances of a brigadier general while actually assigned to such duty: *Provided,* That the present incumbent of the office may be appointed a brigadier general of the Army, retired, and shall be eligible

for the position of president of the commission if recalled to active service by the President under the provisions of existing law.

The salary of the president of the Mississippi River Commission shall hereafter be $10,000 per annum, and the salary of the other members of the commission shall hereafter be $7,500 per annum. The official salary of any officer of the United States Army or other branch of the Government appointed or employed under this Act shall be deducted from the amount of salary or compensation provided by, or which shall be fixed under, the terms of this Act.

SEC. 9. The provisions of sections 13, 14, 16, and 17 of the River and Harbor Act of March 3, 1899, are hereby made applicable to all lands, waters, easements, and other property and rights acquired or constructed under the provisions of this Act.

SEC. 10. That it is the sense of Congress that the surveys of the Mississippi River and its tributaries, authorized pursuant to the Act of January 21, 1927, and House Document Numbered 308, Sixty-ninth Congress, first session, be prosecuted as speedily as practicable, and the Secretary of War, through the Corps of Engineers, United States Army, is directed to prepare and submit to Congress at the earliest practicable date projects for flood control on all tributary streams of the Mississippi River system subject to destructive floods which projects shall include: The Red River and tributaries, the Yazoo River and tributaries, the White River and tributaries, the Saint Francis River and tributaries, the Arkansas River and tributaries, the Ohio River and tributaries, the Missouri River and tributaries, and the Illinois River and tributaries;

and the reports thereon, in addition to the surveys provided by said House Document 308, Sixty-ninth Congress, first session, shall include the effect on the subject of further flood control of the lower Mississippi River to be attained through the control of the flood waters in the drainage basins of the tributaries by the establishment of a reservoir system; the benefits that will accrue to navigation and agriculture from the prevention of erosion and siltage entering the stream; a determination of the capacity of the soils of the district to receive and hold waters from such reservoir; the prospective income from the disposal of reservoired waters; the extent to which reservoired waters may be made available for public and private uses; and inquiry as to the return flow of waters placed in the soils from reservoirs, and as to their stabilizing effect on stream flow as a means of preventing erosion, siltage, and improving navigation: *Provided,* That before transmitting such reports to Congress the same shall be presented to the Mississippi River Commission, and its conclusions and recommendations thereon shall be transmitted to Congress by the Secretary of War with his report.

The sum of $5,000,000 is hereby authorized to be used out of the appropriation herein authorized in section 1 of this Act, in addition to amounts authorized in the River and Harbor Act of January 21, 1927, to be expended under the direction of the Secretary of War and the supervision of the Chief of Engineers for the preparation of the flood-control projects authorized to be submitted to Congress under this section: *Provided further,* That the flood surveys herein provided for shall be made simultaneously with

the flood-control work on the Mississippi River provided for in this Act: *And provided further,* That the President shall proceed to ascertain through the Secretary of Agriculture and such other agencies as he may deem proper, the extent to and manner in which the floods in the Mississippi Valley may be controlled by proper forestry practice.

SEC. 11. That the Secretary of War shall cause the Mississippi River Commission to make an examination and survey of the Mississippi River below Cape Girardeau, Missouri, (a) at places where levees have heretofore been constructed on one side of the river and the lands on the opposite side have been thereby subjected to greater overflow, and where, without unreasonably restricting the flood channel, levees can be constructed to reduce the extent of this overflow, and where the construction of such levees is economically justified, and report thereon to the Congress as soon as practicable with such recommendations as the commission may deem advisable; (b) with a view to determining the estimated effects, if any, upon lands lying between the river and adjacent hills by reason of overflow of such lands caused by the construction of levees at other points along the Mississippi River, and determining the equities of the owners of such lands and the value of the same, and the commission shall report thereon to the Congress as soon as practicable with such recommendation as it may deem advisable: *Provided,* That inasmuch as the Mississippi River Commission made a report on the 26th day of October, 1912, recommending a levee to be built from Tiptonville, Tennessee, to the Obion River in Tennessee, the said Mississippi River Commission is authorized to

make a resurvey of said proposed levee and a relocation of the same if necessary, and if such levee is found feasible, and is approved by the board created in section 1 of this Act, and by the President the same shall be built out of appropriations hereafter to be made.

SEC. 12. All laws or parts of laws inconsistent with the above are hereby repealed.

SEC. 13. That the project for the control of floods in the Sacramento River, California, adopted by section 2 of the Act approved March 1, 1917, entitled "An Act to provide for the control of the floods of the Mississippi River and of the Sacramento River, California, and for other purposes," is hereby modified in accordance with the report of the California Débris Commission submitted in Senate Document Numbered 23, Sixty-ninth Congress, first session: *Provided*, That the total amounts contributed by the Federal Government, including the amounts heretofore contributed by it, shall in no event exceed in the aggregate $17,600,000.

SEC. 14. In every contract or agreement to be made or entered into for the acquisition of land either by private sale or condemnation as in this Act provided the provisions contained in section 3741 of the Revised Statutes, being section 22 of title 41 of the United States Code shall be applicable.

Approved, May 15, 1928.

APPENDIX B

In the District Court of the United States for the Southeastern Division of the Eastern Judicial District of Missouri. *George W. Kirk, complainant,* v. *James W. Good, Secy. of War; Maj. Gen. Edgar Jadwin, Mississippi River Commission; Brig. Gen. T. H. Jackson, Charles H. West, Robert L. Faris, Edward Flad, John H. Stipes, Col. Edward H. Schulz, and Maj. Ernest Graves, members of Mississippi River Commission; the United States Government, defendants.* No. 349

Plaintiff's application for a temporary injunction, and defendants' motion to dismiss the bill were submitted to the court at the same time. The motion to dismiss will be sustained for the following reasons:

First. The United States is not subject to be sued by a citizen except where it has granted consent, and there is no claim that such has been granted in this instance. Before such a suit may be maintained it is incumbent upon the plaintiff to indicate that the authority to sue exists and to bring himself clearly within the privilege.

Second. Officers of the United States are not subject to suit by a private party where no personal judgment is sought and such officers have no individual interest in the controversy, but where the United States is the only real party in interest and against whom alone the relief sought is effective.

Belknap v. *Schild,* 161 U. S. 10, 40 L. ed. 599; *Louisiana* v. *McAdoo,* 234 U. S. 633, 59 L. ed. 1506.

Third. Moreover, the bill does not assail the Flood Control Act. Such a purpose is expressly disclaimed. It does not allege that defendants are proceeding outside the statute, but on the contrary the averment is that defendants are engaged in carrying out the plan of flood control adopted by Congress. No act amounting to a wrongful invasion of plaintiff's rights is alleged to have been committed or threatened, and clearly no cause of action for the relief prayed is stated.

Fourth. The awarding of the contracts for the construction of the set-back levee, and the execution of said contracts are not alleged to result in the appropriation, and will not in fact, result in the taking of any part of plaintiff's land. The effects of the adoption of the flood-control plan of which plaintiff now complains, viz, the inability to sell his property or to borrow money on the security thereof, are mere consequential damages such as the prospective construction of any great public work is likely to entail, and for which relief is not afforded. Therefore, the remedy of injunction, if otherwise available, is foreclosed. *Manigault* v. *Springs et al.,* 199 U. S. 473, 59 L. ed. 274; *Gibson* v. *U. S.,* 166 U. S. 269, 41 L. ed. 996.

Fifth. The court ought not, and will not, anticipate that defendants in the future, without instituting and prosecuting a condemnation proceeding in the manner provided by law, will appropriate plaintiff's property by removing any part of the present levee along the west bank of the Mississippi River, and thereby flood plaintiff's land. *Oregon* v. *Hitchcock,* 202 U. S. 60, 50 L. ed. 935.

Sixth. Plaintiff has a complete and adequate remedy at law. The Flood Control Act, and the existing statutes made available thereby, provide a full measure of relief.

A decree denying the application for a temporary injunction and dismissing plaintiff's bill may be tendered.

CHARLES B. DAVIS,
U. S. District Judge.

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